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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

EDWARD PASCO et al.,

Plaintiffs and Appellants,

v.

MGK CONSULTING et al.,

Defendants and Respondents.

B281144 c/w B282928

(Los Angeles County
Super. Ct. No. BC559500)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Stephanie Bowick, Judge. Affirmed in part,
reversed in part, and remanded.

Paul Kujawsky for Plaintiffs and Appellants.

Law Offices of Roger G. Honey and Roger G. Honey; Retz &
Aldover and Kirk J. Retz for Defendants and Respondents.

This appeal is from a judgment following a court trial. Plaintiffs and appellants are three individuals who claim to have purchased shares in MGK Consulting, Inc. (MGK), and Sherman Realty Investments, LLC (Sherman Realty), entities through which the parties intended to operate an auto body shop in North Hollywood, California. They sued, individually and as shareholders of MGK and members of Sherman Realty, defendants and respondents for breach of fiduciary duty, judicial dissolution, usurpation of corporate opportunities, and other claims.

At the close of plaintiffs' case, the trial court granted defendants' motion for judgment on the individual and derivative claims concerning MGK, ruling that plaintiffs lacked standing to sue because they failed to prove they were shareholders of MGK. After hearing all of the evidence, the trial court found that plaintiffs failed to prove any of their remaining claims and entered judgment in defendants' favor. The court then granted defendants' motion for attorney fees under Civil Code section 1717 and entered an amended judgment that included the fee award.

We reverse the judgment to the extent it awards attorney fees to defendants under Sherman Realty's operating agreement and affirm the judgment in all other respects.

BACKGROUND

The parties

Plaintiffs are Edward Pasco, Mehrdad Ebrahimpour (Mehrdad), and Saeed Ebrahimpour (Saeed).¹

MGK is a Nevada corporation formed in September 2010. It is registered to do business in California and does business as

¹ Because Mehrdad and Saeed Ebrahimpour share the same surname, we refer to them by their first names to avoid confusion.

Collision Body Specialists. Defendants James Marquardt and Kevork Kahwajian are shareholders of MGK. Marquardt and Kahwajian are also owners of defendant Orange Grove Collision Center, the operator of another auto body shop.

Sherman Realty is a California limited liability company formed in August 2011 that owns the real property on which MGK operates an auto body shop. Marquardt, Mehrdad, and Pasco are members of Sherman Realty.

The parties' agreement

In 2010 or 2011, the parties agreed to open an auto body shop together and to use MGK as the entity through which to operate the business. At the time, Marquardt was MGK's sole shareholder.

The parties signed a memorandum of agreement dated June 10, 2011, in which Marquardt represented that he was the sole shareholder of MGK and that MGK had not yet issued any stock. The memorandum of agreement states that upon payment of \$30,000 from each of Pasco, Saeed, Mehrdad, and Kahwajian, MGK would issue shares so that each of Pasco, Saeed, Mehrdad, Kahwajian, Marquardt, and another individual named Alex Gonzalez would have an undivided one-sixth interest in the corporation.²

² The June 10, 2011 memorandum of agreement states in relevant part: "MGK agrees that upon payment of the sum of \$30,000 each from Edward Pasco, Saeed Ebrahimpour, David (Mehrdad) Ebrahimpour, and Kevork Kahwajian. In addition, MGK and all parties agree that Alex Gonzalez shall receive an equal share based upon services provided, without any monetary consideration. MGK will issue shares so that each shareholder will have an undivided one-sixth interest in MGK Consulting, Inc. Thus, Marquardt shall retain a one-sixth interest in MGK Consulting, Inc." Alex Gonzalez is not a party to this action.

The June 10, 2011 memorandum of agreement contains the following attorney fees provision: “In the event of any litigation arises [*sic*] out of this memorandum, the prevailing party shall be entitled to an award of reasonable attorneys’ fees.” An attorney named Steven Lovett drafted the June 10, 2011 memorandum of agreement.

Lovett, who had previously represented Pasco and Mehrdad, also drafted a conflict waiver letter signed by the parties in July 2011 consenting to Lovett’s joint representation of them and waiving any potential conflict of interest in that regard. The conflict waiver letter states that the signatories “warrant[] that there are no other shareholders, other than the signatories to this document.”

After the parties signed the conflict waiver letter, Lovett drafted bylaws for MGK, an MGK shareholder agreement, and an operating agreement for Sherman Realty. None of these subsequent documents, with the exception of the Sherman Realty operating agreement, were signed by the parties.

The parties formed Sherman Realty in August 2011 to purchase the real property on which MGK was to operate the new business. Sherman Realty purchased property located at 12301 Sherman Way for that purpose.

PROCEDURAL HISTORY

Plaintiffs commenced this action in October 2014. Their operative second amended complaint alleged 10 causes of action, individually and derivatively on behalf of MGK and Sherman Realty: (1) breach of fiduciary duty as to MGK; (2) breach of fiduciary duty as to Sherman Realty; (3) judicial dissolution of MGK; (4) judicial dissolution of Sherman Realty; (5) fraud, deceit, concealment, and omission and misrepresentation of material fact; (6) conversion; (7) conspiracy; (8) usurpation of corporate opportunities; (9) accounting; and (10) declaratory relief.

Plaintiffs testified at trial that they were shareholders of MGK, and that they each invested \$30,000 or more in MGK. Mehrdad testified that he deposited into MGK's bank account a check in the amount of \$25,000 and \$10,000 in cash, and that he was never issued an MGK stock certificate. Plaintiffs did not introduce into evidence a copy of Mehrdad's cancelled check or any other evidence of his deposit, although Mehrdad admitted during cross-examination that he could have obtained a copy of the check from his bank. Mehrdad further testified that he was a director of MGK, but that he had never attended a meeting at which the MGK's board authorized the issuance of stock. During cross-examination, defendants' counsel reviewed with Mehrdad a copy of MGK's bylaws that plaintiffs had submitted as a trial exhibit. Mehrdad admitted that the last page of that trial exhibit appeared to be a signature page from another document altogether, namely, the Sherman Realty operating agreement.

Saeed testified that he invested \$30,000 of his personal funds in MGK, and that between April and July of 2011, he deposited approximately \$140,000 in proceeds from auto body work performed on MGK's behalf into MGK's bank account. Saeed admitted during cross-examination, however, that although he was a signatory on MGK's bank account and had access to those bank records, plaintiffs had not produced any documentary evidence of his investment in MGK or deposits made into MGK's account.

Pasco testified that his investment in MGK consisted of a \$14,000 cashier's check and approximately \$95,000 in parts and labor performed to prepare the 12301 Sherman Way property for MGK's auto body business. Plaintiffs introduced into evidence a copy of a \$14,000 cashier's check payable to MGK and dated May 18, 2011, as evidence of Pasco's investment. Plaintiffs also

introduced into evidence a record of a \$20,000 wire transfer that Pasco testified was used to purchase the Sherman Way property.

At the close of plaintiffs' case, defendants filed motions for judgment under Code of Civil Procedure section 631.8, arguing that plaintiffs lacked standing to sue because they had failed to prove they were shareholders of MGK. Before ruling on the motion, the trial court allowed plaintiffs to reopen their case for the limited purpose of proving that they were shareholders. Plaintiffs then voluntarily dismissed their individual claims for breach of fiduciary duty; fraud; conversion; usurpation of corporate opportunity; and conspiracy and aiding and abetting breach of fiduciary duty and usurpation of corporate opportunities and fraud. Plaintiffs also voluntarily dismissed their accounting cause of action in its entirety. After hearing plaintiffs' additional evidence, the trial court granted defendants' motion as to all causes of action premised upon plaintiffs' investment in MGK.

Defendants then presented evidence with respect to plaintiffs' remaining causes of action, and the parties submitted closing briefs. In a subsequently issued statement of decision, the trial court found that plaintiffs had failed to prove that Marquardt or Kahwajian breached any fiduciary duty to Sherman Realty or embezzled funds of Sherman Realty for their own personal benefit; that Sherman Realty or any of the defendants stole corporate opportunities from MGK or converted MGK's funds; that Marquardt should be ousted from managing Sherman Realty; that Sherman Realty should be dissolved; or that plaintiffs were entitled to any damages. The trial court noted that much of plaintiffs' trial testimony was unsupported by documentary evidence. The court further noted that plaintiffs had falsified evidence by presenting a trial exhibit with a signature page belonging to another document, which the court

found “extremely disturbing and weighs heavily against their credibility.” Judgment was subsequently entered in defendants’ favor on all causes of action.

The trial court granted defendants’ motions for attorney fees under Civil Code section 1717, and entered an amended judgment awarding \$113,850 in fees to MGK and Sherman Realty and \$93,500 in fees to Marquardt, Kahwajian, and Orange Grove.

This appeal followed.

CONTENTIONS ON APPEAL

Plaintiffs contend the judgment must be reversed because (1) the trial court abused its discretion by precluding the testimony of attorney Steven Lovett, who drafted the June 10, 2011 memorandum of agreement and various corporate documents for MGK; (2) the parties’ signed conflict waiver created a conclusive presumption that plaintiffs were shareholders of MGK; and (3) uncontradicted evidence supported their claim for usurpation of MGK’s corporate opportunities.³ Plaintiffs further contend the attorney fees award should be reversed.

DISCUSSION

I. Alleged evidentiary error

Plaintiffs claim that the trial court improperly precluded Steven Lovett from testifying at the trial. The record shows, however, that the trial court never ruled on defendants’ motion in

³ Plaintiffs do not challenge the judgment entered against them on their causes of action concerning Sherman Realty -- breach of fiduciary duty (second cause of action); judicial dissolution (fourth cause of action); fraud (fifth cause of action); conversion (sixth cause of action); conspiracy and aiding and abetting breach of fiduciary duty, usurpation of corporate opportunity, and fraud (eighth cause of action); and declaratory relief (tenth cause of action).

limine to preclude Lovett's testimony because plaintiffs never sought to have Lovett testify at trial.

Before the trial commenced, defendants filed a motion in limine seeking to preclude plaintiffs' witness, Lovett, from testifying at trial on the ground that plaintiffs had failed to disclose Lovett as a potential witness during discovery. The trial court expressly deferred ruling on the motion, based on a representation by plaintiffs' counsel that Lovett's testimony might not be needed at trial. Plaintiffs never called Lovett as a witness, and the trial court never ruled on the motion to exclude him. There is accordingly no evidentiary ruling for this court to review.

II. Plaintiffs' status as shareholders of MGK

A. Applicable law and standard of review

Under California law, to have standing to maintain a derivative action on behalf of a corporation, the plaintiff must establish status as a shareholder of record, holder of a beneficial interest, or holder of a voting trust certificate. (Corp. Code, § 800; *Pacific Lumber Co. v. Superior Court* (1990) 226 Cal.App.3d 371, 376; *Gaillard v. Natomas Co.* (1985) 173 Cal.App.3d 410, 416; *Stockton v. Ortiz* (1975) 47 Cal.App.3d 183, 195.)

Code of Civil Procedure section 631.8 authorizes a court to enter judgment in favor of a defendant when it finds at the completion of the plaintiff's case that the plaintiff failed to sustain its burden of proof. (*People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, 1012.) The trial court here entered judgment in favor of defendants after finding that plaintiffs failed to establish standing as shareholders of MGK. In reviewing the trial court's determination, we must "view the evidence in the light most favorable to the judgment,

and are bound by the trial courts' findings that are supported by the substantial evidence. [Citation.]" (*Ibid.*)

When an appeal concerns a failure of proof at trial, it can be misleading, however, to characterize the issue as whether substantial evidence supports the judgment. This is because such a characterization may "allow an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

B. The evidence does not compel a finding that plaintiffs were shareholders of MGK

Plaintiffs' evidence of their status as shareholders of MGK does not compel a finding in their favor as a matter of law. Plaintiffs' testimony was not uncontradicted or unimpeached, nor was it of such character and weight as to preclude the trial court from finding that they were not shareholders. Plaintiffs' testimony that they each invested \$30,000 or more in MGK was unsubstantiated by any documentary evidence, and as the trial court noted in its statement of decision, their presentation of false documentary evidence substantially undermined their credibility.

Contrary to plaintiffs' assertion, the trial court's determination concerning plaintiffs' shareholder status was not

based solely on the absence of stock certificates. Rather, the trial court found plaintiffs' testimony concerning their claimed investment in MGK not to be credible. The trial court also considered and expressly rejected plaintiffs' argument that they acquired ownership interests in MGK based on the doctrine of equitable estoppel, finding that plaintiffs' attempt to deceive the court by falsifying documents, and their failure to produce bank records, cancelled checks, or any documentary evidence to support their claimed investment estopped them from making such a claim.

Plaintiffs did not argue in the trial court below that the conflict waiver letter prepared by attorney Lovett and signed by the parties created a conclusive presumption under Nevada law⁴ that plaintiffs were MGK shareholders. They accordingly forfeited the right to do so for the first time in this appeal. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 [a reviewing court will ordinarily not consider claims made for the first time on appeal that could have been but were not presented to the trial court].)

Even if the argument were not forfeited, we are unpersuaded by it, for several reasons. First, it is unclear whether the conflict waiver letter is a "written instrument

⁴ Plaintiffs cite Nevada Revised Statutes section 47.240, which provides a conclusive presumption for "[t]he truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title" except for the recital of a consideration. (Nev. Rev. Stats., § 47.240.)

California law provides a similar statutory presumption in Evidence Code section 622: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration."

between the parties” within the meaning of the statute. Assuming it is a “written instrument,” the conflict waiver is between attorney Lovett and the signatories, and not between MGK and plaintiffs.

Second, the facts recited in the conflict waiver do not support plaintiffs’ claimed presumption. The conflict waiver does not state that the signatories are all shareholders of MGK. Rather, it states that “there are no *other* shareholders, other than the signatories.” The wording of that sentence makes sense in the context in which it was made -- the outset of Lovett’s joint representation of MGK and its future shareholders. The signatories’ warranty that there are no other shareholders shields Lovett against claims by other potential equity holders.

Finally, there was evidence that the signatories were not shareholders of MGK at the time of the conflict waiver. Marquardt testified that Lovett drafted the parties’ June 10, 2011 memorandum of agreement, the MGK shareholder agreement, and MGK’s bylaws after preparing the conflict waiver.

Substantial evidence supports the trial court’s finding that plaintiffs are not shareholders of MGK and that they lacked standing to sue on MGK’s behalf. Plaintiffs’ lack of standing precludes them from pursuing a claim for usurpation of MGK’s corporate opportunities. (*New v. New* (1957) 148 Cal.App.2d 372, 389 [nonshareholder lacks standing to sue for misappropriation of corporate opportunity].)

III. Attorney fees

Plaintiffs argue that attorney fees were improperly awarded under Sherman Realty’s operating agreement because that agreement limits recovery of attorney fees to those incurred

in an arbitration.⁵ We review de novo the trial court's determination of the legal basis for an award of attorney fees. (*Butler–Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923.)

The trial court awarded attorney fees pursuant to Article X of Sherman Realty's operating agreement, which states in relevant part:

“Any action to enforce or interpret this Agreement or to resolve disputes between the Members or by or against any Member shall be settled by arbitration in accordance with the rules of the American Arbitration Association. Arbitration shall be the exclusive dispute resolution process in the State of California, but arbitration shall be a nonexclusive process elsewhere. . . . The prevailing party shall be entitled to reimbursement of attorney fees, costs, and expenses incurred in connection with the arbitration. All decisions of the arbitrator shall be final, binding, and conclusive on all parties. Judgment may be entered upon any such decision in accordance with applicable law in any court having jurisdiction thereof.”

Article X of the Sherman Realty operating agreement provides that a prevailing party will only be entitled to attorney fees “incurred in connection with the arbitration.” Here the parties proceeded with litigation. Nothing in Article X provides for attorney fees to a prevailing party who litigates a claim in court. Since the operating agreement does not specifically provide for an attorney fees award in this case, the trial court erred in making an award pursuant to that agreement.

⁵ Plaintiffs' alternative basis for challenging the attorney fees award is that the judgment itself should be reversed. Because they fail to establish any basis for reversing the judgment, their argument for reversing the attorney fees award on that ground necessarily fails.

Ajida Technologies, Inc. v. Roos Instruments, Inc. (2001) 87 Cal.App.4th 534, on which the trial court relied as the basis for its fee award under the Sherman Realty operating agreement, is distinguishable. The parties in that case entered into an agreement to arbitrate any disputes. Applying the deferential standard of review to arbitration awards, the appellate court upheld the arbitration panel's determination that the obligation to arbitrate included disputes arising after the agreement terminated. (*Id.* at p. 544.) The agreement also provided that the arbitration panel would determine "[e]ach party's cost of arbitration, attorneys' fees and costs of experts." (*Id.* at p. 551.) The appellant contended that the obligation to pay attorney fees was extinguished when the agreement terminated, and the respondents were not entitled to attorney fees on appeal. (*Id.* at pp. 551-552.) The court in *Ajida* disagreed, stating "that a contract provision that permits the recovery of fees in arbitration is broad enough to include fees in related judicial proceedings, including an appeal from the judgment confirming the award." (*Id.* at p. 552.) Here, in contrast to *Ajida*, the parties did not arbitrate their dispute, and the attorney fees provision in the operating agreement is inapplicable.

Defendants cite *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175 as support for the argument that plaintiffs are estopped from challenging the attorney fees awarded pursuant to the Sherman Realty operating agreement because plaintiffs sought to recover their attorney fees under that same agreement.⁶ The court in *International Billing Services* articulated the following rule: "Where a party claims a contract

⁶ In their fourth cause of action, plaintiffs sought dissolution of Sherman Realty based on "the Operating Agreement of Sherman," among other grounds. They also sought attorney fees on that cause of action.

allows fees and prevails, it gets fees. Where it claims a contract allows fees and loses, it must pay fees.” (*Id.* at p. 1190.) In a subsequent case, however, the same court rejected that rule as overly broad: “[T]here is no sound policy or legal basis for the broad rule adopted by this court in *International Billing Services*. That rule would instead violate the very policy considerations it purports to serve. We agree with the many state court decisions refusing to apply estoppel against a losing party who sought attorney fees under circumstances where that party would not have been entitled to such fees had it prevailed.” (*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 470 (*M. Perez Co.*)).

In the instant case, plaintiffs would not have been entitled to an award of attorney fees under the Sherman Realty operating agreement had they prevailed on the claims premised on that agreement. They accordingly are not estopped from challenging the attorney fees awarded to defendants under the Sherman Realty operating agreement. (*M. Perez Co., supra*, 111 Cal.App.4th at p. 470.)

DISPOSITION

The judgment is reversed to the extent that it awards defendants attorney fees under the Sherman Realty operating agreement. The matter is remanded to the trial court to determine the amount of fees to be awarded solely under the June 10, 2011 memorandum of agreement. In all other respects, the judgment is affirmed. The parties will bear their respective costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT